

FEDERAL CIRCUIT COURT OF AUSTRALIA

*DHALIWAL & ANOR v MINISTER FOR
IMMIGRATION & ANOR*

[2016] FCCA 445

Catchwords:

MIGRATION – Review of decision of former Migration Review Tribunal – refusal of student visas – interlocutory dismissal of show cause application – no arguable case of jurisdictional error.

Legislation:

Federal Circuit Court Rules 2001 (Cth)
Migration Act 1958 (Cth), ss.97, 477
Migration Regulations 1994 (Cth)

Cases cited:

Patel & Ors v Minister for Immigration [2014] FCCA 2059
Patel v Minister for Immigration [2015] FCAFC 22
Trivedi v Minister for Immigration (2014) 220 FCR 169

First Applicant:	HARPREET KOUR DHALIWAL
Second Applicant:	RAMANDEEP SINGH DHALIWAL
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 122 of 2015
Judgment of:	Judge Driver
Hearing date:	3 March 2016
Delivered at:	Sydney
Delivered on:	3 March 2016

REPRESENTATION

The Applicants appeared in person

Solicitors for the Respondents: Mr K Eskerie of Sparke Helmore

INTERLOCUTORY ORDERS

- (1) Pursuant to s.477(2) of the *Migration Act 1958* (Cth), the time for the filing of the application under s.476 of the Migration Act is extended up to and including 19 January 2015.
- (2) The name of the second respondent is amended to the “Administrative Appeals Tribunal”.
- (3) Pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth), the application is dismissed.
- (4) The applicants are to pay the first respondent’s costs and disbursements of and incidental to the application in the sum of \$3,416 in accordance with rule 44.15(1) and item 2 of Division 1 of Part 3 to the *Federal Circuit Court Rules 2001* (Cth).

(i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 122 of 2015

HARPREET KOUR DHALIWAL

First Applicant

RAMANDEEP SINGH DHALIWAL

Second Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(revised from transcript)

1. This is an application to review a decision of the former Migration Review Tribunal, now the Administrative Appeals Tribunal (Tribunal). The decision was made on 7 November 2014. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicants student visas.
2. Background facts relating to this matter are set out in the Minister's outline of legal submissions filed on 25 February 2016.

3. On 25 October 2012, the applicants applied for student (Temporary) (class TU) (subclass 572) visas¹. On 13 March 2013, a delegate of the Minister refused to grant the student visas because the first applicant, Mrs Dhaliwal, did not satisfy the requirements of clause 572.224(a) of Schedule 2 to the *Migration Regulations 1994* (Cth) (Regulations) because she did not satisfy Public Interest Criterion (PIC) 4020².
4. On 2 April 2013, the applicants applied to the Tribunal for a review of the delegate's decision³.

Tribunal's proceedings

5. On 6 November 2014, the applicants appeared before the Tribunal to give evidence and present arguments with the assistance of their representative⁴ and on 7 November 2014, the Tribunal affirmed the decision not to grant the applicants student visas⁵.
6. The Tribunal considered the primary decision of the delegate, which stated that, on 2 November 2012, Mrs Dhaliwal had provided evidence to the Department considered to be of a “non-genuine” nature⁶, namely, a document from “Axis Bank” dated 30 October 2012, with details of five fixed deposit accounts⁷. An officer of the Department contacted the bank, which confirmed that none of the five fixed deposits detailed in the document existed in any branch of the bank, and that there was no record of the bank having issued the document in question⁸.
7. On 27 November 2012, the delegate invited Mrs Dhaliwal to comment on this information⁹. On 16 January 2013, Mrs Dhaliwal provided two documents to the Department (an email from her agent in India dated 22 December 2012¹⁰ and a letter from Axis Bank dated 17 December 2012¹¹, which provided differing explanations in regard to the fraudulent document¹².

¹ Court Book (CB) 5

² CB 83

³ CB 84

⁴ CB 116

⁵ CB 129

⁶ CB 82

⁷ CB 71-72

⁸ CB 130 at [4(c)]

⁹ CB 58

¹⁰ CB 67

¹¹ CB 66

¹² CB at [4(d)-(f)]

8. At the Tribunal hearing, Mrs Dhaliwal provided to the Tribunal further documentary evidence¹³, and a third (different) explanation in regard to the fraudulent document¹⁴.
9. The Tribunal asked Mrs Dhaliwal if she was relying on “all or any of those explanations.” Mrs Dhaliwal said that she did “not know exactly what happened,” and that her agent (in India) was “responsible for providing the applicants with the documents”¹⁵.
10. The Tribunal considered whether Mrs Dhaliwal met PIC 4020 as required by clause 572.224(a) of the Regulations. PIC 4020 provides:
 - (1) *There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:*
 - (a) *the application for the visa; or*
 - (b) *a visa that the applicant held in the period of 12 months before the application was made.*
11. The Tribunal noted that the requirement in PIC 4020(1) not to provide a bogus document or false and misleading information applies whether or not the document was provided by Mrs Dhaliwal knowingly or unwittingly. Further, while PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Tribunal to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged, citing *Trivedi v Minister for Immigration (Trivedi)*¹⁶.
12. The Tribunal considered Mrs Dhaliwal’s three different explanations in regard to the fraudulent document, and the contention that her agent (in India) was “responsible for providing the applicants with the documents”¹⁷, but did not accept any of the explanations offered in

¹³ CB 131 at [7]

¹⁴ CB 131 at [8]

¹⁵ CB 132 at [12]

¹⁶(2014) 220 FCR 169. CB 133 at [19]

¹⁷ CB 134 [20]-[21]

regard to the fraudulent document, finding them to be “implausible and contradictory”¹⁸.

13. The Tribunal placed “greater weight” on Axis Bank’s response to the Department’s official enquiries than it did on the information provided by Mrs Dhaliwal and her agent in India¹⁹.
14. The Tribunal found that the fraudulent document from Axis Bank (dated 30 October 2012) was given to the Department by Mrs Dhaliwal, and was a “bogus document:” a document that purported to have been made, but was not, issued in respect of the person²⁰.
15. The Tribunal found therefore that Mrs Dhaliwal did not meet PIC 4020(1) for the purposes of clause 572.224(a) of the Regulations²¹.
16. The Tribunal went on to consider whether the requirements of PIC 4020(1) should be waived pursuant to PIC 4020(4):
 - (4) *The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:*
 - (a) *compelling circumstances that affect the interests of Australia; or*
 - (b) *compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;**justify the granting of the visa.*
17. At the Tribunal hearing, the Tribunal explained the waiver provision to Mrs Dhaliwal, and she gave evidence in relation to her study in Australia²². The Tribunal found that Mrs Dhaliwal did not raise any evidence applicable to the waiver provision, and that there was no evidence before it of any matters which would permit the waiver of PIC 4020(1)²³.

¹⁸ CB 134 at [27]

¹⁹ CB 134 at [29]

²⁰ CB 134 at [30]; s.97(a) of the Migration Act

²¹ CB 134 at [32]

²² CB 132 at [14]

²³ CB 135 at [34]

18. The Tribunal concluded that Mrs Dhaliwal did not satisfy PIC 4020(1) for the purposes of clause 572.224(a) of the Regulations²⁴ and, therefore, that the second applicant, Mr Dhaliwal, did not satisfy the secondary criteria for the grant of the student visa²⁵.

The present proceedings

19. These proceedings began with a show cause application filed on 19 January 2015. There are two grounds in that application:
1. *The Tribunal erred in failing to determine whether the First Applicant knowingly provided false or misleading information in relation to her visa application.*
 2. *The Tribunal erred in asking itself a wrong question and/or failed to consider a relevant matter by finding that PIC 4020(1) was satisfied whether or not the First Applicant knowingly provided false or misleading information in relation to her visa application.*
20. The application was filed significantly outside the period prescribed in s.477(1) of the Migration Act. The applicants sought an extension of time. In support of that application, the applicants rely upon an affidavit by Mrs Dhaliwal made on 1 March 2016.
21. Having made enquiries, the Minister concedes that the applicants have advanced a satisfactory explanation for the delay in filing the show cause application. In short, the initial notification of the Tribunal's decision was ineffective and the decision was re-notified. Following that re-notification, the applicants acted promptly to file their show cause application.
22. In the circumstances and without considering the legal merit of the application, I was satisfied that the interests of the administration of justice required the granting of an extension of time, which was not opposed by the Minister. I extended time pursuant to s.477(2) of the Migration Act.
23. The application is otherwise supported by a short affidavit filed with it which I received.

²⁴ CB 135 at [35]

²⁵ CB 135 at [37]

24. I also have before me as evidence the court book filed on 24 April 2015.
25. Only the Minister had filed legal submissions in accordance with orders made by Registrar Morgan on 2 April 2015.
26. I invited oral submissions from Mrs Dhaliwal. For that purpose I explained to her the difficulty she and her husband faced in light of the decision of the Federal Court in *Trevedi*. In short, it seemed to me that the applicants were attempting to re-argue an issue which has already been settled by the Federal Court in a decision binding upon me.
27. The Minister's submissions deal with the issue in greater detail. I agree with those submissions.
28. The Tribunal was correct in noting²⁶ that the requirement in PIC 4020(1) not to provide a bogus document or false and misleading information applies whether or not the document was provided by the applicant knowingly or unwittingly. It is well established that it is not necessary in order to engage the operation of PIC 4020 that a visa applicant "was knowing or complicit in the deceptive character of the information ... furnished"²⁷.
29. It follows that the Tribunal was correct in noting²⁸ that while PIC 4020 refers to information that is false, in the sense of purposely untrue, there is no error in the Tribunal failing to conclude that Mrs Dhaliwal was aware the information was purposely untrue in order for PIC 4020 to be engaged. It could not be said therefore that the Tribunal erred in this respect, or by asking itself a wrong question, or failing to consider a relevant matter.
30. While not raised by the applicants, for completeness, I have considered the requirement that "an element of fraud or deception is necessary in order to attract the operation of PIC 4020" and "that PIC 4020 is directed to information or documents which are purposely untrue"²⁹. In the present matter, the Tribunal considered but did not accept any of the explanations offered by Mrs Dhaliwal in regard to the fraudulent

²⁶ at [19] of the decision record

²⁷ see *Trivedi* at [43], [45], [50], [52]

²⁸ also at [19] of the decision record

²⁹ *Trivedi* at [33] and [49], respectively

document³⁰, placing “greater weight” on Axis Bank’s response to the Department’s official enquiries³¹. This led the Tribunal to find that the fraudulent document from Axis Bank (dated 30 October 2012) was given to the Department by Mrs Dhaliwal, and was a document that purported to have been made, but was not, issued in respect of the person (a “bogus document”)³².

31. While the Tribunal did not refer to the test of what amounts to a bogus document as approved in *Trivedi*, in reaching its conclusion it directly considered whether the fraudulent document was a bogus document with the meaning of s.97(a) of the Migration Act, and its discussion of the fraudulent document’s provenance³³ “reveals its implicit conclusion that the document was deliberately incorrect”³⁴.
32. Ms Dhaliwal and her husband were not able to advance any other legal issue bearing upon the decision of the Tribunal. Neither is any issue of jurisdictional error apparent to me from my own reading of the material. I conclude that the applicants are unable to demonstrate an arguable case of jurisdictional error.
33. Accordingly, I will order that the application be dismissed pursuant to rule 44.12(1)(a) of the *Federal Circuit Court Rules 2001* (Cth) (Federal Circuit Court Rules).
34. In consequence of the dismissal of the application, the Minister seeks an order for costs in accordance with the Court scale. Mrs Dhaliwal did not wish to be heard on costs.
35. I will order that the applicants are to pay the first respondent’s costs and disbursements of and incidental to the application in the sum of \$3,416 in accordance with rule 44.15(1) and item 2 of Division 1 of Part 3 to the Federal Circuit Court Rules.

I certify that the preceding thirty-five (35) paragraphs are a true copy of the reasons for judgment of Judge Driver

Date: 8 March 2016

³⁰ CB 134 at [27]

³¹ CB 134 at [29]

³² CB 134 at [30]; s.97(a) of the Migration Act

³³ at [27], [29] and [30] of the decision record

³⁴ *Patel & Ors v Minister for Immigration* [2014] FCCA 2059 at [22]; upheld by the Full Federal Court in *Patel v Minister for Immigration* [2015] FCAFC 22